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Book Reviews: The Brethren: Inside the Supreme Court

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THE BRETHREN: INSIDE THE SUPREME COURT. By Bob Woodward & Scott Armstrong. Simon & Schuster, New York, New York. 1979. Pp. 467. Reviewed by Kenneth Lasson.[†]

The Brethren is a largely undocumented, unfairly written, unsatisfyingly sketchy account of the Burger Court's first seven terms. It is also a book that is useful and fascinating, if not necessary, to a realistic understanding of the dynamics of Supreme Court jurisprudence.

Here for the first time, perhaps, lawyers and laymen alike are made privy to at least some of the pressures brought to bear on, predilections indulged in, and real power exercised by the nine life-term members of the Court. If nothing else they are humanized by the book, which thus affords a more genuine perspective into their decisions than that available solely through the somewhat sanitized opinions themselves.¹ It also serves to substantiate a suspicion long held by many law professors, that the Justices frequently decide cases first on gut reactions — their personal, basic notions of fairness² — and only then devise (if necessary) rules or tests to fit their holdings, which are later inevitably modified, clarified, or (as in obscenity tests from *Roth*³ to *Miller*,⁴ the separate-but-equal standard from *Plessy*⁵ to *Brown*,⁶ etc.) simply discarded.

While sources of information are not identified, there is little reason to doubt the care with which the authors verified them⁷ — perhaps with more care than those in the average law review article. In this regard *The Brethren* is an impressive piece of investigative journalism. From many of Burger's public pronouncements and much of his demeanor — his aloofness, his apparent fear of the press, his opinions themselves — the picture of an arrogant and pompous man may not be far from accurate.⁸

But that, of course, should not be enough for the fair-minded reader. Woodward and Armstrong seem so one-sided in their

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1. *The Brethren's* popularity — first on the *New York Times* bestseller list for many weeks — may likewise help to educate the public about something so elementary as who is on the Court. Thus, WTOP Radio in Washington, D.C., for example, might be able to avoid calling one of the Justices "Stewart Potter," as it did at 11:30 A.M. on the morning of April 16, 1980.

2. See Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16-22 (1978).

3. *Roth v. United States*, 354 U.S. 476 (1957).

4. *Miller v. California*, 413 U.S. 15 (1973).

5. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

6. *Brown v. Board of Education*, 347 U.S. 483 (1954).

7. THE BRETHREN at 3-4.

8. E.g., TIME, November 5, 1979, at 60-64; NEWSWEEK, June 13, 1977, at 101; TIME, April 19, 1976, at 89.

characterization of the Chief, so willing to accept as truth the obviously biased views of disenchanted clerks and confidants, that their portrait of Burger *et al.* is to the discerning observer undoubtedly distorted and unreliable. Moreover, much of what the Justices are reported to have said and done behind the scenes is defensible behavior, and in Burger's case could just have easily been made to appear as justifiable leadership⁹ if the authors had chosen their adjectives differently (or camouflaged their own biases better).

The accounts provided of various votes taken in conference are frequently haphazard and conjectural. Is this a thorough description of what happened in the abortion cases? Obscenity decisions? Capital-punishment deliberations? Probably not, we suspect, were we able to consult the brethren themselves. Even less accurate, probably, are the intrigues and animosities that Woodward and Armstrong report as fact. They imply hard feelings on the basis of soft evidence — even while conceding that the Justices themselves on occasion misread the esteem of their colleagues.¹⁰

In addition, the tone throughout is so consistently conspiratorial and melodramatic that the contrast required for verisimilitude is severely diminished. The portraits are painted in stark blacks and whites, the Justices made to act and react in unfairly editorial extremes. Thus the Chief is alternately "jubilant"¹¹ and "enraged";¹² Brennan is "helpless"¹³ and "astonished";¹⁴ Blackmun is "delighted"¹⁵ and "mortified";¹⁶ Douglas is "overjoyed"¹⁷ and "furious."¹⁸ Black is "shrill";¹⁹ Marshall "hoped against hope";²⁰ White is "relentless";²¹ Powell, "distressed";²² Rehnquist, "contemptuous."²³ Likewise, there

9. As, for example, his reliance on Justice Blackmun to keep accurate records of the voting in conference, which the authors gratuitously attribute to Burger's supposed inability to do so himself. *THE BRETHREN* at 174.

10. Justice Black, upon reading a biography of former Justice Harlan Fisk Stone, was shaken to discover Justice Stone's real feelings about him. *Id.* at 157.

11. *Id.* at 351.

12. *Id.* at 112.

13. *Id.* at 344.

14. *Id.* at 373.

15. *Id.* at 190.

16. *Id.* at 119.

17. *Id.* at 313.

18. *Id.* at 319.

19. *Id.* at 124.

20. *Id.* at 285.

21. *Id.* at 65.

22. *Id.* at 320.

23. *Id.* at 411.

is no relativity of importance assigned to the events narrated: all are treated as episodes in a B-grade movie.²⁴

More distressing still is the shoddy prose and sloppy syntax, which often make it difficult to decipher how and why one sentence flows from another.²⁵ A hard-to-avoid impression is that Woodward, Armstrong, and their publishers were too anxious to tie together juicy tidbits of gossip, and not interested enough in (or capable enough of) a thorough, textured flow of information.

In short, *The Brethren's* ring of truth is hollow.

But all that is to misplace its importance, as entertaining and educational journalism. Perhaps the book's real weakness — even from the perspective of constitutional law professors, whose greatest pleasure (perhaps) is Supreme Court voyeurism — is that most titillating question left unanswered: how have Chief Justice Burger and his brethren reacted to the leaks — nay, gushes — so deliciously sprung and spurted by Woodward and Armstrong?

The truth is that, despite many pious protestations to the contrary, most of us — gentlemen, scholars, and law professors — can hardly wait for *Brethren II*.

24. After the first few hundred pages, the reader might almost expect the following sort of prose immediately after an important passage:

"One of Marshall's clerks saw the Chief at the beach the Sunday following the Nixon tapes argument. Burger was distraught, because he knew that there had been lint in his recently picked navel. He called his secretary at home and dictated a memo.

"Dear Brethren,

"I am sure you will understand the reasons for delay in the tapes case announcement. We all need some "R & R," and I was taking mine under the sun. This is of course not intended to be a final recommendation on how you take yours. Please remember to remind your clerks about the utmost need for confidentiality in our personal affairs.

Yours as always,

WEB'

"Brennan was miffed. He tapped the clerks' grapevine once again to find out what was going on. Douglas, on the other hand, was overjoyed, and lost no time firing off a note from his retreat in Goose Prairie.

"Dear Chief,

'Omphaloskepsis* becomes us all, on occasion.

Love, Bill'

"*Contemplation of the navel."

25. Examples:

But certain cases drew only *scorn and indifference* from Stewart. In one case, Ohio and Kentucky, divided by the Ohio River, could not agree on their common boundary. An 1820 Supreme Court case put the river in Kentucky and therefore was precedent. But Stewart, who came from Ohio, told his clerks that he had another reason for voting against his home state. "My father always told me at the breakfast table that the Ohio River was in Kentucky."

THE BRETHREN at 270 (emphasis added).

Earl Warren had often called those cases the most significant decisions of the Court during his tenure, *despite the fact that* Brennan had written many of the key opinions. Brennan was the father of reapportionment.

Id. at 271 (emphasis added).

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